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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re A.S., a Person Coming Under the  
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

J.M.,

Objector and Appellant.

D055680

(Super. Ct. No. NJ13659A)

APPEAL from an order of the Superior Court of San Diego County, Michael Imhoff, Commissioner. Affirmed.

J.M. (J.) appeals from an order denying her request to have her former foster child returned to her home. We reject her contentions of error and affirm the trial court's order.

## FACTUAL AND PROCEDURAL BACKGROUND

A.S. (A.) was born in April 2005. In June 2007 at age two, she was declared a dependent of the court after being removed from the custody of her mother (Mother) due to exposure to domestic violence and other factors creating a risk to her safety. A. was detained in a foster home, and Mother was provided reunification services.

In the jurisdictional/disposition report, the Health and Human Services Agency (Agency) reported that A. had some disruptive behaviors, including biting and yelling at other children. A. thereafter had six different foster placements, due largely to disruptive and aggressive behavior, including hitting, biting, defiance, and sexual acting out. In December 2007, she commenced treatment with a behavioral specialist.

On March 4, 2008, when she was almost three years old, A. was placed in the foster home of appellant, J. After being placed with J., A. exhibited no further behavior problems. Mother visited with A., but ultimately did not adequately comply with her reunification plan. In June 2008, the Agency recommended that A. continue to reside with J., that reunification services for Mother be terminated, and that the court set a Welfare and Institutions Code section 366.26 permanency planning hearing.<sup>1</sup> The Agency noted that J. was willing to provide a permanent home for A. In November 2008, the court terminated reunification services for Mother, appointed J. to make educational decisions for A., and set a section 366.26 hearing for March 12, 2009.

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<sup>1</sup> Subsequent statutory references are to the Welfare and Institutions Code.

On February 9, 2009, the foster family agency (HOPE) that certified J.'s home informed the Agency that it was decertifying her home on February 13, 2009, due to her noncompliance with various regulations and rules relevant to foster home certification.<sup>2</sup> The Agency could not maintain A. in J.'s home once it was decertified. For this reason, on February 13, 2009, the Agency removed A. from J.'s home and placed her in the concurrent foster-adoptive home of R. and C.

In a February 27, 2009 report prepared for the upcoming section 366.26 hearing, Agency social worker Jennifer Ramos reported that A. was highly adoptable because she had "demonstrated an ability to make healthy attachments and to be resilient in the face of change and uncertainty." Ramos stated that A. had referred to J. as "mommy" and J. had wanted to adopt A., but there were barriers to permitting this adoption because J. had lost her foster care certification. The new foster parents had reported that A. had made a smooth transition into their home; there were no behavior concerns; and they were willing to provide her a permanent home through adoption. Ramos noted that R. and C. had an approved adoptive home study, and stated that "it will be important to give [A.] time in her current relatively new placement to evaluate [its] appropriateness as a long term placement for her." To provide additional time to identify an adoptive home, the

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<sup>2</sup> The noncompliance concerned the failure to submit required forms (i.e., for vehicle safety inspection, physical examination, income verification, and proof of automobile insurance), and complaints regarding such matters as disconnected phone and utilities, lack of a bed for a child, an eviction notice, standing water in her yard, unsecured vitamins and toxins, and inappropriate communications and interactions with biological parents and agency workers.

Agency requested a continuance of up to 120 days for the section 366.26 permanency planning hearing.<sup>3</sup>

On March 12, 2009, the court continued the section 366.26 hearing until July 9, 2009.

On March 19, 2009, J. filed a section 388 modification motion requesting that the court order that A. be returned to her home. J. explained that effective March 12, 2009, her home had been recertified by another foster family agency (Kamali'i), but that the Agency had stated it would not return A. to her. The Agency and minor's counsel recommended denial of J.'s motion. An evidentiary hearing on the section 388 motion began on June 9, 2009 and, for scheduling reasons, continued over several hearing dates until August 6, 2009.<sup>4</sup> J. testified at the hearing, as well as various professionals involved in the case.

At the hearing, J. described her close bond with A., stating that A. called her "mommy" and had a close relationship with her nine-year-old daughter. The Agency social worker assigned to the case in 2008 (Rebecca Rabe) corroborated the close bond between J., J.'s daughter, and A. Rabe testified there were no concerns about A.'s welfare when she resided with J., and Rabe had viewed J. as a good adoptive parent for A.

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<sup>3</sup> The Agency was also reviewing the home of A.'s maternal grandfather as a prospective adoptive home.

<sup>4</sup> The section 366.26 permanency planning hearing was continued until August 17, 2009.

J. and the Agency social worker assigned to the case in January 2009 (Ramos) testified that during a visit with J. shortly after A.'s removal from J.'s home, A. requested to go home with J. Further, during supervised visits between A. and A.'s grandmother shortly after the removal from J.'s home, A. was not her typical "bubbly" verbal self, but rather was nonverbal or regressed to "baby talk." After a couple of weeks, A.'s demeanor improved during the visits and she became more verbal and engaged.

Ramos testified there were a variety of reasons why the Agency had decided not to return A. to J. even though J.'s home was recertified by Kamali'i. Ramos explained there were four CPS referrals made regarding J.'s foster care (in June, October, and December 2008 and in January 2009). Three of the referrals had been determined to be unfounded. However, the June 2008 referral, which had been investigated by two social workers, was found to be unfounded by one social worker and to be inconclusive by the other social worker. Because of the inconclusive finding by one of the social workers, the Agency believed that J. might lose her foster home certification with Kamali'i.

In making its decision not to return A. to J.'s home, the Agency also considered HOPE's assessment that J.'s home should be decertified; information from two other Agency social workers indicating problems working with J. as a foster parent; and an opinion from a supervisor of the licensing agency overseeing HOPE that a child should not be placed with J. without a probationary period. Ramos stated that A. called her current foster parents "mommy and daddy"; A. was bonded with her foster parents' seven-year-old daughter; and A. had told Ramos she was happy at her current home. Further, the current foster parents had an approved adoptive home study and were

prepared to offer A. a permanent home. Ramos opined that it would not be in A.'s best interests to disrupt her once again by returning her to J.'s home.

To refute the Agency's explanations for refusing to return A. to her, J. claimed that her problems with HOPE commenced when she confronted HOPE about some questionable practices on its part, which led to an adversarial relationship that ultimately culminated in the decertification. J. testified that she had complied with the foster care requirements identified by HOPE, and she provided information to dispel other concerns identified by HOPE.<sup>5</sup> She explained the details of the incident relating to the CPS referral that had resulted in an inconclusive finding, and presented the testimony of the Agency social worker who had found this allegation to be unfounded.<sup>6</sup> Additionally, Kamali'i's administrator testified that after researching the matter, she had determined that J. could retain her certification even if she had an inconclusive finding on a CPS referral, and that Kamali'i would not revoke her certification if A. was placed with her. J. stated that she had applied to adopt A., that she had taken all the required courses for adoption, and that the social worker only needed to complete the home visit.

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<sup>5</sup> For example, J. testified (and provided some supporting documentation) to show that she had provided the required forms regarding vehicle safety and other matters, she never received an eviction notice, her gas had been briefly turned off while SDG&E inspected her home after she smelled gas, the standing water was merely water in a bird bath, she had remedied the unlocked vitamins and medications, and she did not communicate inappropriately with biological parents or others.

<sup>6</sup> The allegation in the CPS referral was that she had choked a foster child in her care. According to J. and her daughter, J. had performed the Heimlich maneuver on the child when he choked on a piece of candy. The allegation surfaced when the child told his therapist that J. had choked him.

### *Trial Court's Ruling*

In oral arguments to the court after the presentation of evidence, J.'s counsel clarified that he was not asserting that the Agency abused its discretion in initially removing A. from J.'s home when her home was decertified, but rather that the Agency abused its discretion in failing to return A. to her home after she was recertified.

The court found that although it was uncontradicted that A. made "extraordinary gains" while in J.'s care and that she was attached to J. and J.'s daughter, it was not in A.'s best interests to return her to J.'s home. The court stated it could not "sort through" the controversy that developed between J. and HOPE, but the fact remained that, unfortunately for A., the Agency had no choice but to remove A. when HOPE decertified J.'s home. The court found that J. had shown a change in circumstances because J.'s home was recertified by Kamali'i; she was currently in good standing with Kamali'i; and Kamali'i had no present intention of decertifying J.'s home. However, the court assessed that when looking at the matter through A.'s eyes, "a significant period of time has passed" and she was in a "very stable, appropriate placement at this time." The court reasoned that the current foster home was approved for adoption; A. had formed new attachments in her current foster home, including attachments with the other child in the home; and those attachments would be disrupted if the court ordered placement with J. Applying the best interests of the child standard, the court denied J.'s request that A. be returned to her home.

## DISCUSSION

J. asserts the trial court abused its discretion in denying her motion to return A. to her home. The Agency, with the concurrence of minor's counsel on appeal, contends the court's decision was proper.

When a child is declared a dependent of the court and removed from parental custody, the social services agency is authorized to select a suitable interim placement for the child pending reunification or adoption. (*In re Cynthia C.* (1997) 58 Cal.App.4th 1479, 1490; § 361.2, subd. (e).) Further, the agency is "authorized to exercise its discretion to reassess the suitability of the environment in which it had placed the child and, if deemed unsuitable, move the minor to an improved situation." (*In re Cynthia C.*, at p. 1490.) The agency's placement decisions are subject to judicial review for abuse of discretion. (*Ibid.*; *In re Shirley K.* (2006) 140 Cal.App.4th 65, 72.) When reviewing the agency's placement decision, the trial court decides whether the agency "'acted arbitrarily and capriciously, considering the minor's best interests.'" (*In re Shirley K.*, *supra*, 140 Cal.App.4th at p. 72, italics omitted.)<sup>7</sup> Likewise, when reviewing a request for modification under section 388, the court considers whether the requested modification would be in the best interests of the child. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519,

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<sup>7</sup> This case does not involve a party who was designated a "prospective adoptive parent" under section 366.26, subdivision (n), which is governed by the statutory standards set forth in that section. (See *State Dept. of Social Services v. Superior Court* (2008) 162 Cal.App.4th 273, 285-286.)



526-527, & fn. 5; *In re B.D.* (2008) 159 Cal.App.4th 1218, 1228.)<sup>8</sup> On appeal, we review the trial court's ruling on a modification motion for abuse of discretion. (*In re Carl R.*, *supra*, 128 Cal.App.4th at p. 1072; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

The record shows no abuse of discretion in the court's ruling. The court and parties acknowledged that A.'s removal from her stable, bonded placement with J. was unfortunate. Regardless of the merits of HOPE's decision to decertify J.'s home as a foster home, J.'s trial counsel recognized that the Agency had no control over this and the Agency did not abuse its discretion when removing A. once the decertification occurred. When A. was removed from J.'s home, she was placed with a family that was ready and willing to give her a permanent home. Meanwhile, the Agency social worker had acquired information that raised doubts in her mind about the viability of J.'s recertification and the suitability of her home for immediate foster care placement.

Ultimately, the trial court was required to review the Agency's placement decision by considering the difficult question of what was in A.'s best interest. The court reasonably determined that returning A. to J., notwithstanding their strong bond, would constitute another move for a child who had already experienced multiple placements,

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<sup>8</sup> By its terms, section 388 applies to requests to modify court orders. (§ 388, subd. (a).) However, the section has also been used for requests to modify agency decisions. (See, e.g., *In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1052; *In re Shirley K.*, *supra*, 140 Cal.App.4th at pp. 70-71; see discussion in *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1072, fn. 14; see also *In re Cynthia C.*, *supra*, 58 Cal.App.4th at pp. 1481, 1485, 1489-1490, fn. 8 [section 388 modification motion is proper procedure to use when petitioner seeks return of dependent child to foster home; the motion seeks change of court order giving social service agency discretion to decide placement]; accord *In re Matthew P.* (1999) 71 Cal.App.4th 841, 847, 848-849.) The parties have not disputed the applicability of section 388 in this case, and we assume its applicability.

and would disrupt bonds that A. had now formed with her new foster family who were prepared to adopt her. This assessment was not an abuse of discretion.

J. contends the trial court erred because it did not apply the foster parent preference defined in section 366.26, subdivision (k). Section 366.26, subdivision (k), provides that when the court has approved a permanent plan of adoption for a dependent child, a foster parent's application for adoptive placement shall be given preference over other applications if the agency determines the child has substantial emotional ties with the foster parent and removal from the foster parent would be seriously detrimental to the child's well-being. The statutory foster parent preference requires the trial court to process the foster parent's application for adoption first and give it "serious and . . . preferential consideration"; it does not mean the foster parent is automatically entitled to adopt. (*In re Lauren R.* (2007) 148 Cal.App.4th 841, 860; *In re Harry N.* (2001) 93 Cal.App.4th 1378, 1396-1397.)

Assuming arguendo the foster parent preference set forth in section 366.26, subdivision (k) applied to J.'s section 388 motion even though the court had not yet approved a permanent plan of adoption (see *In re Lauren R.*, *supra*, 148 Cal.App.4th at p. 856), the record shows no error in this regard.<sup>9</sup> In her written section 388 motion, J. cited section 366.26, subdivision (k) and stated that she was entitled to the foster parent

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<sup>9</sup> The section 366.26 permanency planning hearing was scheduled before J. filed her section 388 motion, but the section 366.26 hearing was thereafter continued and the section 388 motion heard first. The court denied J.'s section 388 motion on August 6, 2009, and on August 17, 2009, terminated parental rights and approved a permanent plan of adoption.

preference. J. asserts that the trial court's statements at the hearing reflect that it was unaware that a foster parent was entitled to preference. The record does not support this claim. When making its ruling, the trial court stated that there was no case authority on point defining the standard to apply when a foster parent requests return of a child, and that it did not appear a foster parent has any legal entitlement to any particular child. The court elaborated that a different standard would apply if the court was evaluating the initial removal of A. in February, but once A. was removed on appropriate grounds, J. had no legally enforceable right to placement of A. in her home. The court's reference to the different standard applicable to the initial removal from A.'s residence reflects that it understood that when a child is residing with a foster parent with whom the child has bonded, the foster parent can claim the adoption preference.

However, as recognized by the trial court, the posture of the case for purposes of the section 388 hearing was that A. was *not* residing with J., but rather was residing with her new foster parents. Even assuming the foster parent preference nevertheless was applicable to J. given A.'s recent prior residence with her and the closeness of their bond, the foster parent preference likewise applied to A.'s *current* foster family, with whom A. had also formed a bond. Further, it is apparent from the record that the court understood that A.'s undisputed bond to J. warranted serious consideration when the court was reviewing the Agency's decision not to return A. to her. Indeed, the undisputed bond was the whole point of the section 388 hearing because without that bond there would have been no reason to consider returning A. to J. The court was in effect considering the desires of *two* foster parents to retain A. in their homes for purposes of adoption. The

record does not show that the court misunderstood its obligation to give preference to foster parents who wish to adopt a dependent child.

J. also suggests A.'s best interests were ignored when visitation was not permitted between J. and A., and then by the time of the court's ruling the lack of contact was used as a factor to support not returning A. to J. After A. was removed from J.'s home in February 2009, J. initially had visits and phone contact with A. In her March 2009 motion for the return of A. to her home, J. asked the court to order weekly visitation pending resolution of the matter. At a hearing in April 2009, the court set the evidentiary hearing on J.'s motion for June 9, 2009, and ruled that in the interim the Agency social worker had the discretion to arrange visits between J., J.'s daughter, and A. with the concurrence of A.'s counsel. The social worker decided not to permit visitation.<sup>10</sup>

At a hearing in July, J.'s counsel noted that the hearing was protracted and requested that the court order visitation, or at least telephone contact, between J. and A. rather than leaving contact to the discretion of the social worker. The Agency opposed the request because the social worker had assessed contact was detrimental to the stability of the current placement. A.'s counsel urged the court to leave visitation to the discretion of the social worker because of the potential for upset to A. The court denied the request for a visitation order. The court reasoned that if J.'s motion was granted, there was

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<sup>10</sup> According to J., social worker Ramos had threatened to deny visitation if J. filed her section 388 motion, and when she subsequently filed it, Ramos permitted no more visitation. Ramos denied she made any such threat, and claimed that she stopped the visitation because J. had made false statements that A. was being abused in her current foster home. J. in turn denied she made this accusation, stating that she had merely reported that A. told her that her hair was pulled.

sufficient attachment between J. and A. that the relationship could be quickly renewed, whereas if the motion was denied, there were valid concerns about confusing A. Acknowledging the disappointment felt by J., the court suggested that with the concurrence of the current foster mother and the social worker, J. and her daughter could send a card or letter to A. that could be shared with her.

The record does not show A.'s best interests were ignored when the court declined to require visitation. Again, the court was resolving difficult questions about what was best for A. Ultimately, the court determined that it was in A.'s best interests to remain with her current foster family. There is no basis to upset the court's decision based on the denial of visitation.

J. asserts that this case is comparable to *In re Shirley K.*, *supra*, 140 Cal.App.4th 65, where we reversed a trial court's ruling concerning a placement modification request made by the minor's grandparents. The contention is unavailing. In *Shirley K.*, we concluded that the trial court failed to properly recognize its role in evaluating the child's best interest, and failed to recognize that the grandparents were not seeking to delay the permanency order but rather were claiming changed circumstances warranting return of the minor to their home or liberal, unsupervised visitation. (*Id.* at p. 73.) Accordingly, we remanded the matter to the trial court to determine whether the child's best interests would be served by return of the child or, alternatively, liberal visitation. (*Id.* at p. 75.) No such circumstances are present here. Contrary to J.'s contention, the trial court expressly referred to, and applied, the best interest of the child standard. The court's decision is supported by the record, and there is no basis for reversal.

DISPOSITION

The order is affirmed.

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HALLER, J.

WE CONCUR:

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McCONNELL, P. J.

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HUFFMAN, J.